No. 1097

Supreme Court of the United States

OCTOBER TERM 1941

ODELL WALLER,

Petitioner,

against

RICE M. YOUELL, SUPERINTENDENT OF THE STATE PENITENTIARY, RICHMOND, VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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MORRIS SHAPIRO,
MARTIN A. MARTIN,
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Statutes Cited

All provisions of the Constitution and Code of Virginia, cited herein, are appended to the brief filed in support of this petition.

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To the Honorable the Supreme Court of the United States:

ODELL WALLER respectfully petitions this Court for the issuance of a writ of certiorari directed to the Supreme Court of Appeals of Virginia to review the final judgment of that Court of January 22nd, 1942, dismissing the petition of said Odell Waller for a writ of habeas corpus, *Waller* v. *Commonwealth,* 178 Va. 294.

Summary of Matters Involved.

Petitioner, a negro sharecropper, was indicted on July 15, 1940 by a special grand jury at Pittsylvania County, Virginia, for the alleged murder in the first degree of one Oscar Davis, his former white landlord. (Tr. 1, 2.)*

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* References herein are to pages of the certified transcript of record from Supreme Court of Appeals of Virginia, filed with this petition pursuant to Rule 38 (1) of this Court.

Petitioner pleaded not guilty, was tried before a petit jury of the Circuit Court of Pittsylvania County, found guilty, and his punishment fixed at death. The Court sentenced petitioner to be electrocuted on December 27, 1940, and, in the meantime, to be committed to the State Penitentiary at Richmond, Virginia (Tr. 2).

The Governor of Virginia stayed petitioner's execution to March 14, 1941 in order to permit petitioner to apply to the Supreme Court of Appeals of Virginia for a Writ of Error.

On March 4, 1941, said Supreme Court of Appeals granted a Writ of Error and Supersedeas (Tr. 2).

On October 13, 1941, that Court affirmed the judgment and sentence of the Circuit Court, *Waller* v. *Commonwealth*, *supra*. Thereupon, the Circuit Court resentenced petitioner to be electrocuted on December 12, 1941 (Tr. 20), but the Governor granted a further stay of execution to March 20, 1942 to permit petitioner to file a petition for a writ of habeas corpus.

A petition for habeas corpus, supported by affidavits as to the factual allegations, was accordingly filed in said Supreme Court of Appeals, on January 12, 1942 (Tr. 1-23).

On January 22, 1942, the Court, without requiring any return or answer by respondent, dismissed the petition, its order merely stating that

> "• • • the court having maturely considered the said petition and exhibits therewith, is of opinion that said writ of habeas corpus should not issue as prayed. It is therefore considered that said petition be dismissed". (Tr. 24)

This petition for certiorari is directed to such judgment of dismissal.

Upon the preceding writ of error, the Supreme Court of Appeals had affirmed the Circuit Court's denial of petitioner's separate motions upon trial to quash the indictment and to quash the *venire facias*, based on petitioner's allegations that both the grand jury and the *venire facias* had been

> "'selected from the poll taxpayers of Pittsylvania County and that such mode of selection deprived the accused of his right to a trial by a jury of his peers and denied him due process of law and equal protection of the laws in contravention of the * * * 14th Amendment to the Constitution of the United States.'" (Tr. 18-19 Exh. 1, pp. 31, 32)*

The Supreme Court of Appeals held that non-payers of poll taxes were not, as petitioner contended, barred as a matter of law from grand and petit jury service, but refused to determine whether nevertheless, they were barred as a matter of fact, since petitioner had offered no such evidence in support of his motions to quash, nor any evidence that the petitioner was himself a non-payer of poll taxes, *Waller* v. *Commonwealth, supra.*

Thereupon petitioner filed his petition for habeas corpus in the Supreme Court of Appeals,** alleging that, in fact, non-payers of poll taxes were systematically barred from grand and petit jury service in Pittsylvania County, and had been so barred from the grand jury indicting petitioner and from the petit jury trying him (Tr. 1-23). The

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* The Supreme Court of Appeals construed both motions as based on *exclusion* of non-payers of poll taxes, and not merely on *inclusion* of poll tax payers. See Point III of argument in brief filed in support of this petition for certiorari.

** The Constitution of Virginia, Sec. 88, (Virginia Code 1936, App. p. 2352) confers original jurisdiction on the Supreme Court of Appeals "in cases of habeas corpus" etc.

allegations of the petition in this respect were supported by the affidavit of Martin A. Martin, one of the petitioner's counsel, such affidavit showing in detail the evidence in support of such allegations as disclosed by affiant's examination of the records of the Clerk of the Circuit Court of Pittsylvania County (Tr. 22, 23).

It is assumed that, for the purposes of this petition for certiorari, the sworn allegations of fact of the petition for habeas corpus will be taken as true, since the Supreme Court of Appeals dismissed that petition without requiring any return or answer by respondent, and solely on the ground that the petition was insufficient on its face to entitle the petitioner to the writ. Cf. *Whitten* v. *Tomlinson*, 160 U. S. 231.

Indeed, the reasons for the presumption of the truth of the sworn facts alleged in the petition for habeas corpus are stronger here than in the ordinary case. It can hardly be assumed that the Supreme Court of Appeals, had it any doubt of the truth of those facts, would not have afforded the respondent an opportunity to challenge them and thereby have put the petitioner on proof of them. Otherwise, it would be necessary to assume that that Court not only permitted, but compelled, the presentation of grave constitutional questions to this Court, upon a case which it had reason to believe might prove moot. Moreover, the very nature of the facts alleged was such as to put a particular responsibility on the Supreme Court of Appeals in this respect, since those facts related to the administration of justice in its subordinate courts, a subject peculiarly within its concern and knowledge.

The petition for habeas corpus alleged in substance:

A. That petitioner is a negro who, at the time of his trial, was 23 years old and had been, for several years

preceding his trial, a sharecropper; that, as such, his economic circumstances prevented him from paying a poll tax and that he had not, in fact, at any time paid a poll tax, and was at all times unable to do so. (Tr. 6) Petitioner's affidavit in these respects was attached to the petition (Tr. 21).

B. That persons, otherwise eligible for grand and petit jury service under the laws of Virginia, who have not paid poll taxes, are in fact systematically barred in Pittsylvania County, Virginia, from serving either as grand or petit jurors, and were in fact so barred from the grand jury indicting petitioner and from the petit jury trying him (Tr. 7).

That, of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such taxes for the years 1938 to 1940, both inclusive. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7).

That all persons on the petit jury before whom defendant was tried, and all persons upon the *venire facias* from which said petit jury was drawn, had paid their poll taxes in full for the years 1938 to 1940, both inclusive (Tr. 7).

That the persons summoned by said *venire facias* were taken from the jury list compiled by the jury commissioners of Pittsylvania County, in purported compliance with Section 4895 of the Code of Virginia; that said jury list contained the name of no person who had not paid poll taxes; that all names appearing on said jury list were names of persons appearing on the poll tax list of Pittsylvania County, and no others; that said poll tax list con-

tained the names of all persons who had paid poll taxes for the year 1940 and within a period of two years preceding 1940, and of no other persons; that such poll tax lists were the exclusive source from which said jury commissioners drew the names appearing on said jury list; that the jury lists in Pittsylvania County are habitually so compiled, and thereby non payers of poll taxes are habitually and systematically excluded from juries in said county (Tr. 7, 8).

The foregoing allegations, stated under "B" herein, were supported by the affidavit previously referred to of one of petitioner's counsel, Martin A. Martin (Tr. 22, 23).

C. That while the Constitution and laws of Virginia, as construed by the Supreme Court of Appeals of Virginia, in its opinion on petitioner's writ of error, *Waller* v. *Commonwealth, supra,* do not expressly make payment of poll taxes, nor therefore the right to vote, a qualification *in law* for either grand or petit jurors, such Constitution and laws, as shown by the allegations of the petition summarized under "B" herein, have not only been administered, so as to make payment of poll taxes, and thereby the right to vote, a qualification *in fact* for grand and petit jurors, but such Constitution and laws have been designed to permit them to be so administered, by means of the wide discretion conferred upon judges and jury commissioners in the selection of grand and petit jurors, respectively. The applicable sections of the Constitution and laws are specified in the petition (Tr. 11-14). They are too lengthy and complex to be set out herein, but are appended verbatim to the brief filed in support of this petition.

D. That the Constitution and laws of Virginia providing for a poll tax are in themselves unlawful and invalid

by reason of the following facts and circumstances (Tr. 8-11):

That the Act of Congress of January 26, 1870, 16 St. p. 62, readmitting the State of Virginia to representation in the Congress of the United States, provided, among other things that

> "* * * the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said state; provided, that any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters."

That these provisions of the Act of January 26, 1870 are within the powers of Congress under Section 5 of the 14th Amendment and Section 2 of the 15th Amendment to the Constitution of the United States.

That the Constitution of the State of Virginia mentioned in the Act of January 26, 1870, as then in effect, made no provision for a poll tax and that, under said Constitution, all citizens, otherwise entitled to vote, were entitled to vote without payment of any poll tax.

That by sections 18, 19, 20, 21 of the Constitution of Virginia of 1902,* that state for the first time provided either in its Constitution or any other law, for the payment of a poll tax and for making the payment of such poll tax a qualification for the right to vote.

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* All of the provisions of the Constitution and Codes of Virginia specified in the petition for habeas corpus are set out verbatim in an appendix to the brief filed in support of this petition.

That provisions of the Virginia Code contemporaneously enacted, as well as provisions in force at the time of the indictment and trial of petitioner, all of which are specifically referred to in the petition, but are too lengthy to be here set out*, likewise make the payment of poll taxes a qualification for the right to vote.

That it was the avowed purpose of the Constitutional Convention of Virginia, which adopted the Constitution of 1902, to amend the suffrage clause of the then existing constitution so as to deprive, *inter alia*, negroes of the right to vote. That in such convention Delegate (now United States Senator) Carter Glass stated:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions. We expect to make distinctions. We will make distinctions." (Proc. Const. Conv. p. 14)
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> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) whose capacity for self-government we have been challenging for thirty years past". (Idem, p. 3257)

That, pursuant to the purpose of said Constitutional Convention to deprive citizens and classes of citizens of their previously existing right to vote and of their civil and political rights and public privileges, including the right of jury service, such convention eliminated from the

Bill of Rights of the Constitution of Virginia of 1902 the provisions of Section 20 of the Bill of Rights of the then existing Constitution of Virginia, that

> "20. That all citizens of the state are hereby declared to possess equal civil and political rights and public privileges". (Mumford's Code of Virginia, 1873, p. 70)

E. That the Constitution and laws of Virginia, so designed and administered, operate to exclude systematically from grand and petit jury service a numerous and widespread class of citizens, otherwise qualified who, because of the disabilities common to the economic status of their class, have been unable to and have not paid poll taxes as required by such Constitution and laws (Tr. 15).

That while negroes and sharecroppers are not, as such, barred from service and grand and petit jurors, they, because of their similar economic status, constitute a large proportion of the class of persons so barred, and the petitioner himself is of such economic class (Tr. 15).

That such economic class, who are unable to and do not pay poll taxes, and who are thereby barred from service as grand and petit jurors, is so numerous and widespread that, in Pittsylvania County, Virginia, with a population for the year 1940 of approximately 30,000 persons over twenty years of age, only approximately 6,000 were able to pay and did pay their poll taxes, and were therefore eligible in law to vote and in fact to serve as grand and petit jurors (Tr. 16).

F. That, by reason of all the foregoing facts and circumstances, petitioner's commitment and the proceedings upon which it is based are wholly null and void and without authority in law, and in violation of the equal protec-

tion and due process clauses of the 14th Amendment to the Constitution of the United States (Tr. 16, 17).

The basis upon which it is contended this Court has jurisdiction to review the judgment and decree in question.

It is respectfully submitted that, under Title 28, Section 344(b), (Judicial Code, Sec. 237, amended), this Court has jurisdiction of this petition for certiorari, such petition being one to review a final judgment and decree by the Supreme Court of Appeals of Virginia, the highest court of that state in which a decision could be had, which judgment and decree dismissed a petition for habeas corpus in which petitioner specially set up and claimed, under the Constitution of the United States, the right, privilege, and immunity against being deprived by the State of Virginia of his life and liberty without due process of law and against being denied by that State the equal protection of the laws.

Opinions Below.

The opinion of the Supreme Court of Appeals of Virginia dismissing the petition for a writ of habeas corpus is unreported, but is appended to this petition.

The opinion of that Court affirming, upon writ of error, the judgment of the Circuit Court of Appeals of Pittsylvania County, which judgment found petitioner guilty of murder in the first degree and sentenced him to death, is reported *Waller* v. *Commonwealth,* 178 Virginia 294.

The Questions Presented.*

The basic question presented by this petition for certiorari is whether the provisions of the 14th Amendment to the Constitution of the United States against the denial by a state of equal protection of the laws, *are limited to denials solely because of race or color, or extend to denials based upon the economic status of a widespread economic class, to which petitioner belongs,* where, as here, the record shows; that such class, including the petitioner, because of their common economic disabilities, have been unable to pay and have not paid poll taxes; that solely for this reason such class, otherwise qualified, has in fact been systematically barred by the State of Virginia from serving either as grand or petit jurors; and that they were in fact so barred from the grand jury indicting petitioner and from the petit jury before which he was tried and convicted.

The question is also presented whether such systematic barring by the State of Virginia of non-payers of poll taxes from both grand and petit jury service constituted a denial to petitioner of due process of law in contravention of the 14th Amendment.

The Reasons Relied On for Allowance of the Writ.

It is respectfully submitted that, by reason of the following, the Supreme Court of Appeals of the State of Virginia, in dismissing the petition for habeas corpus in

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* No question is presented by this petition for certiorari based on those allegations of the petition for habeas corpus (Tr. 4, 5) with reference to the overruling by the trial court of challenges for cause of certain jurors by reason of the fact that they were shown by examination on *voir dire* to be landlords employing sharecroppers.

that court, has decided Federal questions of substance, not theretofore determined by this Court, and has decided them in a way probably not in accord with the applicable decisions of this Court.

On this record, it stands admitted:

(a) That petitioner is a negro and was, at the time of his indictment and conviction, 23 years old and had been, for several years preceding, a sharecropper; that as such, he is one of a numerous and widespread economic class of citizens of that State who, because of disabilities common to the economic status of their class, are unable to pay, and have not paid the poll taxes required by the Constitution and laws of Virginia as a qualification for voting in that State; that such economic class comprises over 80% of the adult citizens of Pittsylvania County, and that negroes and sharecroppers constitute a large proportion of such economic class.

(b) That, while the Constitution and laws of Virginia, as construed by the Supreme Court of Appeals of that State in *Waller* v. *Commonwealth, supra,* do not make the payment of poll taxes, and thereby the right to vote, a qualification *in law* for either grand or petit jury service, such Constitution and laws are expressly designed to permit them to be administered, and they are administered, so that citizens of that State, otherwise eligible for grand and petit jury service under the Constitution and laws of that State, but who have not paid their poll taxes, are *in fact* systematically barred from both grand and petit jury service, and were in fact so barred from the grand jury indicting petitioner and from the petit jury before which he was tried and convicted.

(1) Petitioner submits that the State of Virginia in systematically barring under such circumstances all non-

payers of poll taxes from either grand or petit jury service directly violates the principles of two recent decisions of this Court.

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, p. 130:

> *"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups, *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government."*

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, p. 358:

> *"Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races* —otherwise qualified to serve as jurors in a community —*are excluded as such from jury service."*

It is true that in both cases it was the systematic exclusion of negroes from jury service which was held to constitute a denial under the 14th Amendment of equal protection of the laws. It may be contended, moreover, that under the dicta of this Court in *Strauder* v. *West Virginia,* 100 U. S. 303, 310, and in the *Slaughter-House Cases,* 83 U. S. (16 Wall.) 36, 81, the provisions of the 14th Amendment against denial of equal protection of the laws are limited to denials solely because of race or color. However, in both cases this Court expressly refused so to hold (*Strauder* case, p. 310; *Slaughter-House Cases,* p. 72), and there is dicta in both cases which argues against such construction.

Those cases, as well as others in which this Court has considered the application of the equal protection clause of the 14th Amendment to the systematic exclusion, not only of negroes, but of other classes of citizens, from grand and petit juries, will be discussed at further length in the brief filed in support of this petition.

It will suffice to say that petitioner will undertake in such brief to demonstrate that the provisions of the 14th Amendment against denial of equal protection of the laws are not limited to such denial merely on account of race and color, but must of necessity extend to the systematic exclusion from jury service of an entire economic class such as that to which petitioner belongs.

Indeed it would lead to sheer absurdity to hold that the provisions of the 14th Amendment against denial of equal protection of the laws are limited to denials merely because of color or race.

This would mean that any state would be free to bar from jury service all Catholics or all Protestants, *but could not similarly bar Jews;* all Republicans or all Democrats; all members of labor unions; all members of the C.I.O. but not all of the A. F. of L., or *vice versa;* all persons upon WPA relief; all persons with incomes over $10,000 or over any other amount; all persons with incomes less than $10,000 or less than any other amount.*

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* Cf. *Civil Rights Cases,* 109 U. S. 3, 11, 13.
American Sugar Refining Co. v. *Louisiana,* 179 U. S. 89, 92.
Kentucky v. *Powers,* 201 U. S. 1, 32-33, 37.
Ruthenberg v. *U. S.,* 245 U. S. 480, 481, 482.
Mamaux v. *U. S.,* 264 Fed. 816, 818-819.
Juarez v. *State,* 277 S. W. (Texas) 1091, 1094.
These cases are discussed in the brief filed in support of this petition.

Obviously, a construction which even conceivably could lead to such results would be, in the language of this Court in *Smith* v. *Texas, supra*:

> "* * * at war with our basic concepts of a democratic society and a representative government."

Furthermore, it would violate that tradition to which this Court refers in its same decision:

> "* * * the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

Finally, it would require this Court to ignore that it has placed no such limited construction on the due-process clause of the same sentence of the 14th Amendment, but has extended the protection of that clause even to inanimate corporations of no race and of no color.

(2) Assuming that the equal protection clause of the 14th Amendment is not limited to denials merely because of color or race, the allegations of the petition for habeas corpus to the Supreme Court of Appeals of the State of Virginia would seem to come directly within the decision of this Court in *Rogers* v. *State of Alabama,* 192 U. S. 226.

The petition for habeas corpus before the Supreme Court of Appeals alleged in substance, as already set out, that the Constitution and laws of the State of Virginia were expressly designed to permit them to be administered, and they are administered, so as to make the payment of poll taxes, and thereby the right to vote, a qualification in fact though not in law for grand and petit jurors; that this is accomplished by specified provisions of the Constitution and laws vesting wide discretion in those charged with the selection of such jurors; further,

that the provisions of such Constitution and laws making the payment of poll taxes a qualification for voting are themselves invalid under the Act of Congress of January 26, 1870, *supra*, being intended to disenfranchise negroes and others theretofore entitled to vote.

In *Rogers* v. *Alabama, supra*, Rogers, a negro who had been indicted and convicted of murder, had made a motion to quash the indictment because, as stated by this Court, page 229:

> "* * * the jury commissioners appointed to select the grand jury excluded from the list of persons to serve as grand jurors all colored persons, although largely in the majority of the population of the county, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color *and of their having been defranchised and deprived of all rights as electors in the state of Alabama by the provisions of the new Constitution of Alabama.* * * * To show the reality of the second reason alleged for the exclusion of blacks from the grand-jury list, the motion, as a preliminary, *alleged that the sections of the new Constitution* which were before this Court in *Giles* v. *Harris*, 189 U. S. 475, *were adopted for the purpose, and had the effect of disenfranchising all the blacks on account of their race and color and previous condition of servitude.*"

Rogers' motion to quash was stricken under the provisions of Section 3280 of the Civil Code of Alabama as unnecessarily prolix. Rogers excepted, but his exceptions were overruled by the Supreme Court of Alabama. This Court then said (p. 239) in holding that Rogers had been denied equal protection of the laws:

> "We follow the construction implicitly adopted by the supreme court of Alabama, and assume that this section was applicable to the motion. *We also assume,*

as said by the court, that the qualifications of the grand jurors are not in law dependent upon the qualifications of electors, and that any invalidity of the conditions attached to the suffrage could not of itself affect the validity of the indictment. *But in our opinion that was not the allegation. The allegation was that the conditions said to be invalid worked as a reason and consideration in the minds of the commissioners for excluding blacks from the list.* It may be that the allegation was superfluous and would have been hard to prove but it was not irrelevant, for it stated motives for the exclusion which, however mistaken, if proved, tended to show that the blacks were excluded on account of their race, *as part of a scheme to keep them from having any part in the administration of the government or of the law.''*

Petitioner respectfully submits, therefore, that for all the foregoing reasons, the writ of certiorari to the Supreme Court of Appeals of Virginia should issue as prayed.

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